Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of The United States
October Term 1997

DELROY BLASKE,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED FOR REVIEW

Does the applicable statute of limitations for a claim for disability benefits governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"), act to bar the claim of the Plaintiff-Appellant in its entirety as opposed to simply barring a claim for monthly benefits falling outside the period of limitations?

LIST OF PARTIES AND PROCEEDINGS

Petitioner/Plaintiff
Delroy Blaske
P.O. Box 14366
Scottsdale, AZ 85267-4366

Respondent/Defendant
UNUM Life Insurance Company of America
2211 Congress Street
Portland, ME 04122

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> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $75,000, exclusive of interest and costs, and is between --
> (1) Citizens of different States;

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> Subd. 2. Required provisions. Except as provided in subdivision 4 each such policy delivered or issued for delivery to any person in this state shall contain the provisions specified in this subdivision in the words in which the same appear in this section. The insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Such provisions shall be preceded individually by the caption appearing in this subdivision or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve.
>
> LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit, filed December 18, 1997, is set forth in Appendix A. The decision of the United States District Court of Minnesota, Third Division, and the Honorable Michael J. Davis, dated March 11, 1997, is contained in Appendix B.

STATEMENT OF THE BASIS FOR JURISDICTION OF THE SUPREME COURT

The Supreme Court has jurisdiction to consider this Petition under 28 U.S.C. § 1254. The United States Court of Appeals for the Eighth Circuit denied Appellant's request for reconsideration on February 12, 1998. This Petition is timely filed.

STATEMENT OF CASE

I. Factual Background

Delroy R. Blaske was issued a policy of disability insurance by UNUM Life Insurance Company of America as a result of his prior participation in an ERISA-governed employee welfare benefit plan sponsored and maintained by his former employer. The effective date of the policy was September 16, 1985. The policy contracted to provide Blaske with disability benefits upon proof that he was (1) disabled due to sickness or injury; and (2) required the regular attendance of a physician. Pursuant to the terms of the policy, UNUM would continue to pay disability benefits so long as Blaske remained disabled and required the regular attendance of a physician.

> The policy provides in pertinent part:
> When must we be notified of a claim?
> You must give us written notice of claim within 30 days of the date disability starts. If that is not possible, you must notify us as soon as you can. . . .
> When does proof of claim have to be given?
> You must give us proof of claim no later than 90 days after the end of the elimination period.
> If it is not possible for you to give proof within these time limits, it must be given as soon as reasonably possible, but you may not give proof later than one year after the time it is otherwise required.

The policy also states:

> Can legal proceedings be started at any time?
> No, you or your authorized representative cannot start any legal action: (1) until 60 days after proof of claim has been given nor (2) more than 3 years after the time proof of claim is required.

Blaske suffers from Primary Sclerosing Cholangitis, Crohn's Colitis and Psoriasis. Primary Sclerosing Cholangitis is a slowly progressing disease of the liver for which there is no known cure. This condition was first diagnosed in the late 1970s. As a result, Blaske experiences severe flue-like symptoms of fatigue and achiness. The Crohn's Colitis appeared after the onset of the Primary Sclerosing Cholangitis, but became significantly worse in the early 1990s. As a result of Crohn's Colitis, Blaske typically spends seven hours a day in the bathroom. An exact date of onset can not be identified for either condition. Because of the slow progression of the conditions, it is virtually impossible to identify a specific date on which Blaske was rendered disabled.

During the 1980s and early 1990s, Blaske was the primary owner, managing partner-financial and operating partner, for the Blaske Franchise Group, an organization of partnerships which owned and operated a number of Burger

King franchises in Minnesota and Kansas. The franchises were sold in the early and mid-1990s.

On February 26, 1995, Blaske submitted an Application for Disability Benefits to UNUM. In that application, Blaske informed UNUM that he had been unable to work because of his disability since approximately October 1990 or January 1991.

By letter dated March 28, 1995, UNUM denied Blaske's claim for disability benefits. The basis for denial was Blaske's failure to submit an Application for Benefits within the time frame specified in the contract. In its denial letter of March 28, 1995, UNUM informed Blaske of his right to have an in-house administrative review. By letter dated April 28, 1995, Blaske sought an administrative review of UNUM's denial of disability benefits.

By letter dated July 10, 1995, UNUM reaffirmed its decision to deny Blaske's claim for benefits.

II. Procedural History of This Case

On or about October 13, 1995, Blaske commenced the present action in the District Court for the State of Minnesota. On October 30, 1995, UNUM filed a Petition for Removal of Civil Action to U.S. District Court, claiming that the United States District Court for the State of Minnesota had original jurisdiction under 28 U.S.C. § 1332(a)(1) since

the action sought the payment of benefits which were governed by 29 U.S.C. § 1001, et seq. (ERISA).

On September 6, 1996, cross-motions for summary judgment were argued before the Honorable Michael J. Davis, Judge of United States District Court, District of Minnesota, Third Division. By an Order dated March 11, 1997, Judge Davis granted UNUM's Motion for Summary Judgment and denied Blaske's cross-motion for summary judgment. Specifically, Judge Davis ruled that Blaske's failure to comply with the notice and proof of claim provisions in UNUM's disability insurance policy operated as an absolute bar to any claim for benefits. Additionally, Judge Davis concluded that the three-year limitations period of UNUM's disability insurance policy barred Blaske's claim.

Blaske filed a Notice of Appeal on April 9, 1997. Oral arguments were heard by a three-judge panel of the United States Court of Appeals for the Eighth Circuit on November 21, 1997. The Court of Appeals filed an opinion on December 18, 1997, which affirmed the decision of the district court. In that opinion, the Court of Appeals ruled that the action was barred by the statute of limitations. The Court of Appeals did not reach a decision on the question of whether or not the dismissal of the action based upon the notice and filing provisions of the UNUM policy was proper.

A Petition for Rehearing was filed December 31, 1997. This Petition was denied on February 12, 1998.

Appellant Blaske requests the Supreme Court grant his Writ of Certiorari because the decision of the United States Eighth Circuit Court of Appeals is in conflict with previous decisions of the United States Ninth Circuit Court of Appeals. See, Supreme Court Rule 10(a).

ARGUMENT

In affirming the decision of the District Court, the Eighth Circuit Court of Appeals determined that the Blaske's claim was barred by the statute of limitations. ERISA does not contain a statute of limitation for the filing of benefit actions under 28 U.S.C. § 1132. Adamson v. Armco, Inc., 484 F.3d. 650 (8th Cir. 1995). Therefore, the Trial Court looked to Minnesota law for the most analogous state statute of limitations. See, Minn. Stat. § 62A.04 (1995).

On appeal, Blaske argued that the Trial Court erred in the manner in which it applied the statute of limitations. It is claimed that an error occurred in the holding that the statute acts an absolute bar to Blaske's entire claim for benefits. The statute of limitations does not act as a bar to Blaske's entire claim. Rather, the statute of limitations would only bar a claim for benefits payable for those particular months falling outside of the statute of limitations. The statute of limitations should not prohibit Blaske from maintaining an action for benefits for the months falling within the statute of limitation or after filing of this action.

The interpretation of the statute of limitations advanced by the Plaintiff is consistent with that adopted by the United States Ninth Circuit Court of Appeals in the case of Nikaido v. Continental Life Ins. Co., 42 F.3d. 557 (9th Cir. 1994). Nikaido involved a claim for disability benefits under an ERISA-governed plan. The payment of disability benefits

to the insured was discontinued in November of 1987. An action was filed in August of 1992. The District Court dismissed the action, finding that it was time barred by the statute of limitations.

The Continental Life policy provided that, "any action must be brought within three years of the date that proof of loss is due." 42 F.3d. at 560. In interpreting this policy language, the Ninth Circuit Court of Appeals found that the plan created a relationship akin to an installment contract. The court noted:

> "For each month that a claimant is disabled and the company fails to make payment, a separate cause of action accrues."
>
> 42. F.3d. at 560.

Under this interpretation, it was concluded that the District Court erred in dismissing the action. Claims for monthly benefits arising within the three years prior to the filing of suit were not barred by the statute of limitations.

The holding of the Eighth Circuit Court of Appeals in this case is directly contrary to that of the Ninth Circuit. It is appropriate for the Supreme Court to grant this Writ of Certiorari to resolve the conflict and adopt the reasoning of the Ninth Circuit Court of Appeals.

The reasoning of the Ninth Circuit is the most persuasive. A claim for ERISA benefits is a contract action for purposes of the statute of limitations. Adamson v. Armco, Inc., 484 F.3d. 650 (8th Cir. 1995). The contract in this case imposes upon UNUM, an ongoing duty to pay Blaske disability benefits during Blaske's period of disability. Each month of disability is a distinct benefit period. At any time, the disability may end and the benefits discontinued. Eligibility may be challenged monthly by the insurer.

Under this analysis, the statute of limitations would bar Blaske's claim for benefits for the monthly periods tolling outside the statute of limitations. The statute of limitations would not prohibit the maintenance of an action for benefits arising thereafter or benefits which have continued to accrue under the policy since the commencement of the action.

This is an important issue which affects many policyholders dependent upon disability benefits for their day-to-day living expenses. Acceptance of this Petition will resolve the conflict existing between the Eighth and Ninth Circuits. Contract law and logic dictate that the holding of Nikaido v. Continental Life Ins. Co., 42 F.3d. 557 (9th Cir. 1994), be adopted and the remand of this case for further consideration consistent therewith.

CONCLUSION

For the foregoing reasons, The United States Supreme Court should grant Petitioner Delroy Blaske a Writ of Certiorari and reverse the Opinion of the Eight Circuit which had affirmed the dismissal of Blaske's action on the basis of Statute of Frauds.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORDER DENYING REHEARING
FILED, FEBRUARY 12, 1998
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OPINION
FILED, DECEMBER 18, 1997
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2006MNST

Delroy R. Blaske,	*	
Appellant	*	
	*	Appeal from the United
v.	*	States District Court for
	*	the District of Minnesota
Unum Life Insurance	*	
Company of America,	*	
Appellee.	*	

The petition for rehearing filed by the appellant has been considered by the court and is denied.

February 12, 1998

Order Entered at the Direction of the Court

/s/ Michael E. Gans
Clark, U.S. Court of Appeals, Eighth Circuit,.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2006

Delroy R. Blaske,	*	
Plaintiff-Appellant	*	
	*	Appeal from the United
v.	*	States District Court for
	*	the District of Minnesota
Unum Life Insurance	*	
Company of America,	*	
Defendant-Appellees.	*	

Submitted: November 21, 1997
Filed: December 18, 1997

Before BOWMAN, MURPHY, Circuit Judges, and CONMY[1], District Judge.

CONMY, District Judge.

I. Background

Mr. Blaske was insured by UNUM Life Insurance

[1]The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota, sitting by designation.

Company with a policy providing disability benefits. He filed a notice and proof of claim for benefits in February of 1995. The onset of the disability from a progressively disabling disease, primary sclerosing cholangitis/Crohn's colitis, was stated by him to begin " 10 / '90 or 1 / '91 ".

The policy language required the insured to give written notice within thirty days of the date the disability starts. It further provides that proof of claim must be given, at the latest, twenty one months after the onset of the disability. A final requirement is that legal action cannot be maintained after three years from the date that proof of claim is required.

UNUM denied the claim in March of 1995, citing that Mr. Blaske had failed to follow the notice and proof of claim provision in the policy. After an exchange of correspondence, UNUM informed Mr. Blaske that the decision to deny benefits was its final decision. This action was filed in state court on October 15, 1995, and removed by UNUM to federal court based on federal question jurisdiction: Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §§ 1001-1461. 28 U.S.C. § 1331; 29 U.S.C. § 1132(e)(1).

The District Court[2] granted summary judgment to UNUM on both the issue involving the late filing of the notice and proof of claim, and also on the three year

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[2]The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

"limitations" period in the policy. The District Court determined that Mr. Blaske had not come forward with evidence to create a genuine factual dispute as to whether the onset of his disability began any later than January 1, 1991; thus, proof of claim was required to be filed, at the latest, on or before September 28, 1992, and the limitations period set out in the policy required suit to be started before September 28, 1995.

II. Standard of Review

This Court reviews *de novo* a district court's grant of summary judgment, to determine whether the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Donaho v. FMC Corp., 74 F.3d 894, 897-897 (8th Cir. 1996).

III. Discussion

ERISA is silent as to the import of disability insurance policy requirements of notice and proof of claim. When there is no federal statutory law to apply in ERISA litigation, the court should look to "federal common law" as a source for interpretation. Reid, 17 F.3d 1092, 1098 (8th Cir. 1994). Counsel for Mr. Blaske urges that this Court adopt as a requirement of federal common law that UNUM be required to show that the late filing of the proof of claim resulted in prejudice to the insurance company. While at least one district has incorporated this provision into its determination of federal common law, the Eighth Circuit has not had

occasion to make a determination on this issue. See, Cisneros v. UNUM Life Ins. Co. of America, 115 F.3d 669 (9th Cir. 1997). Counsel would then seek to "boot strap" Mr. Blaske into compliance with the three year limitation period by incorporating the prejudice requirement into the time period reserved for filing the proof of claim.

We do not find it necessary to reach the question involving prejudice. ERISA contemplates reference to the most analogous state-law statute of limitations in an action to recover plan benefits. Adamson v. Armco. Inc., 44 F.3d 650, 652 (8th Cir. 1995), *cert. denied,* 64 U.S.L.W. 3230 (U.S. Oct. 2, 1995) (No. 94-2105). Minnesota has a three year statute applicable to an action such as this, and the District Court found the limitations period in the policy to be reasonable. Minn. Stat. § 62A.04, Subd. 2(11). Such a determination is clearly permissible. If Mr. Blaske was entitled to benefits after the expiration of the one hundred eighty day exclusion period, his right to such benefits vested on September 28, 1992, and a three year statute ~~would~~ require suit by September 28, 1995. The policy is more liberal than the Minnesota Statute.

We find that the District Court correctly determined that no question of fact existed as to the time of the onset of Mr. Blaske's disability, which arose on or before January 1, 1991. We affirm the decision of the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
THIRD DIVISION

MEMORANDUM OPINION AND ORDER
FILED, MARCH 12, 1997
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Delroy R. Blaske,
Plaintiff,

v.

UNUM Life Insurance Company of America,
Defendant.

MEMORANDUM OPINION AND ORDER
File No. 3-95-1007

John H. Scherer, Esq., for and on behalf of Plaintiff.

John Harper, III, Esq., and Terrance J. Wagner, Esq., for and on behalf of Defendant.

FACTS

This case involves Plaintiff's attempt to obtain long term disability benefits. Plaintiff is covered under Defendant UNUM Life Insurance Company of America's ("UNUM") long term disability conversion policy No. 152722-001 475-56-5115. The policy provides that Plaintiff must give written notice of his claim within 30 days of the date the disability starts. The policy also provides that proof of claim must be

given within 90 days after the end of the elimination period, or at the latest, one year after proof of claim is otherwise required. Finally, the policy provides that no legal action can be taken on a claim until 30 days after proof of claim has been given, but no more than three years after the time for proof of claim is required.

Plaintiff first made a claim for benefits in February 1995. He sought benefits because he suffered from primary sclerosing cholangitis/Crohn's colitis. Plaintiff informed UNUM that he had not been able to work since October 1990/January 1991.

The claim was denied because Plaintiff failed to follow the notice and proof of claim provisions contained in the policy. Plaintiff was notified of the denial in a letter dated March 28, 1995. Plaintiff appealed the decision by letter dated May 5, 1995. In the letter, Plaintiff stated that he did not file his claim earlier because his attention was focused on selling his businesses and litigation related thereto. By letter dated July 10, 1995, UNUM notified Plaintiff of its decision to uphold the denial of benefits. This action was then commenced on October 15, 1995.

Before the Court are the parties' cross-motions for summary judgment. Plaintiff asks the Court to grant him partial summary judgment, that as a matter of law, a late application does not act as an absolute bar to a claim for benefits accruing 270 days prior to application, but gives rise to a defense of prejudice. UNUM seeks an order that as a matter of law, an untimely claim does serve as an absolute bar

to benefits. UNUM also asserts that the statute of limitations has run on Plaintiff's claims pursuant to the terms of the policy.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir. 1992). As the Supreme Court has stated, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." Celotex, 477 U.S. at 327. For purposes of the parties' cross motions for summary judgement, there are no factual disputes.

There is no dispute that this case is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The parties also agree that none of ERISA's express provisions address the consequence of a claimant's failure to comply with the notice and proof of claim requirements. Where there is no federal statutory law to apply in ERISA litigation, federal common law must be applied. Reid v. Connecticut General Life Insurance Company, 17 F.3d 1092, 1098 (8th Cir. 1994). Where there is no federal common law addressing a specific issue, state law may be used as a guide. Brewer v. Lincoln

national Life Insurance Company 921 F.2d 150, 152 (8th Cir. 1990) cert. denied, 501 U.S. 1238 (1991). State law cannot be used, however, if it is contrary to the provisions of ERISA. Id.

Plaintiff argues there is no federal common law which addresses the consequence of a claimant's failure to comply with notice and proof of claim requirements contained in the policy, therefore the court can look to Minnesota law for guidance. Minnesota law provides that an insurer must show prejudice before it can deny a "late"' claim. See eg., Wheeler v. Equitable Life Assur. Soc'y of United States 211 Minn. 474, 1 N.W.2d 593(1942).

UNUM argues there is federal common law on point, citing to Kennedy v. System One Holdings, Inc., 835 F.Supp. 947 (S.D. Tex. 1993). In Kennedy the court enforced a notice and proof of claim deadline similar to the one at issue in this case. The court ruled that by denying a claim on the basis of timeliness, a plan administrator does not abuse its discretion. Id. In Kennedy, the court did not address the issue of whether federal common law exists as to the consequences of failure to comply with notice and proof of claim requirements. Rather, it simply upheld the plan administrator's decision to deny benefits without requiring a showing of prejudice. See also, Lugo v. AIG Life Insurance Company 852 F.Supp. 187 (S.D.N.Y. 1994)(Denial of untimely claim upheld without requiring prejudice).

Both parties point out that the Kennedy court relied, in part, on two unpublished decisions that similarly upheld a

determination to deny benefits for failure to comply with notice and proof of claim requirements. In Freeman v. UNUM Life Insurance Co., Civil Action No. 3-89-79 (D. Minn. 1990), the late Judge Devitt upheld a plan administrator's decision to deny a claim as untimely. No showing of prejudiced was required. Judge Devitt based his decision to enforce the notice of claim requirement in the policy, in part, on the decision in Marvin Mackey, et al. v. UNUM Life Insurance Co. et al., Case No. C86-5286 (W.D.Wash. May 12, 1987). In Mackey the court also upheld a denial of benefits for failure to comply with proof of loss requirements. In doing so, the court specifically rejected the plaintiff's argument that the court should follow state law which required a showing of prejudice. The court held that state law was inapplicable, citing to Gordon v. ICWU-PMA Benefit Funds 616 F.2d 433, 439 (9th Cir. 1980).

Plaintiff argues that these cases do not establish federal common law as to the consequences of failing to comply with notice and proof of claim requirements, as Kennedy and Freeman both rely on the unreported and unsupported decision of Mackey. Although Mackey clearly is unreported, it is not unsupported. As noted above, Mackey specifically cites to Gordon v. ICWU-PMA Benefits Funds, supra for its determination that state law is inapplicable in ERISA cases where it is inconsistent with federal policy.[1]

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[1]In Gordon, the Ninth Circuit Court of Appeals refused to apply state law to find a plan administrator's decision to deny

UNUM also argues that importation of a prejudice requirement in this case is improper. In Nazay v. Miller 949 F.2d 1323 (3rd Cir. 1991), the Third Circuit Court of Appeals reversed a district's order which imposed a prejudice requirement before a plan administrator could impose penalties for failure to follow policy procedures. The court held:

> Importation of the prejudice rule into the ERISA context is unwarranted and improper. First, ERISA does not require an employer to create a specific benefit plan and does not permit the courts to test the substantive reasonableness of the plan's provisions. . . Instead, ERISA permits judicial review of the administration of a plan once created. . . Thus, the district court's rule is an impermissible usurpation of [the administrator's] authority.

Id., at 1337.

The Court adopts the reasoning of the court in Nazay, and finds that importation of a prejudice requirement in this context is contrary to the policies and proced[illegible]s of ERISA. Accordingly, federal common law as to the effect of a late claim on a claimant's eligibility for benefits exists, and that it

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benefits was arbitrary and capricious, because state insurance law dealing with adhesion contracts is inapplicable to a welfare plan obtained as a result of collective bargaining. Id. at 438-439. The court held applying state law principles was not consistent with federal policy. Id. at 439.

does not require the plan administrator to establish prejudice before denying a claim as untimely.

UNUM also argues that Plaintiff's claim is time-barred, as the notice and proof of claim deadlines are triggered by the start date of the disability. Thus, under the policy, proof of claim must be filed within 90 days after the elimination period, or if not possible to provide proof of claim within 90 days, no later than one year after the time it is otherwise required. The elimination period is 180 days, which begins to run on the first day of disability. UNUM asserts that Plaintiff had to provide proof of claim no later than June 28, 1992.[2] The policy also provides that no legal action may be taken on a claim more than three years after the time for which proof of claim is required. Thus, Plaintiff had to have filed this action on or before June 28, 1995. UNUM asserts, however, that Plaintiff did not bring proof of claim until March 15, 1995 and did not file this action until October 17, 1995. Thus, the claim is barred under the provisions of the policy.

Plaintiff asserts that as ERISA does not contain a statute of limitations for filing a benefit action under 29 U.S.C. § 1132, this Court must look to Minnesota law for the most analogous state statute of limitations. The parties

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[2]This date is computed assuming Plaintiff was disabled as of October 1990. Assuming Plaintiff was disabled as of January 1991, the last date to bring an action would be September 28, 1995 pursuant to the policy language.

appear to agree that the most analogous state statute of limitations is Minn. Stat. § 62A.04, Subd. 2(11), which provides for a three year limitations period. Plaintiff, however, asserts that the state statute of limitations is tolled during the period of disability. As Plaintiff continues to be disabled, Plaintiff's claim is not time-barred.

UNUM asserts that in the absence of a controlling statute to the contrary, a provision in a contract may validly limit the time for bringing an action on such contract. Chilcote v. BlueCross & BlueShield of Wisconsin, 841 F.Supp. 877, 879 (E.D. Wis. 1993)(citing Order of United Commercial Travelers v. Wolfe 331 U.S. 586, 608 (1947)). See also, Ingram v. Travelers Insurance Co, 897 F.Supp. 1160 (N.D. Ind. 1995) aff'd, 78 F.3d 586 (7th Cir. 1996). UNUM also argues that the three year limitations period is reasonable, given the fact that Minn. Stat. § 62A.04, Subd. 2(11), the statute which Plaintiff seeks the Court to apply as the most analogous state statute of limitations, is three years. The Court finds that the argument of UNUM is persuasive and finds that the claim is time-barred pursuant to the terms of the policy.[3]

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[3]The result is the same if Minn. Stat. § 62A.04, Subd. 2(11) is applied, as that statute provides "[n]o such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished." Plaintiff attempts to persuade the Court that to determine when proof of loss is required, the Court must look to Section 62A.04, Subd. 2(7). Subdivision 2(7) provides, in part, that proof of loss must be made within 90 days after the

IT IS HEREBY ORDERED that Defendant UNUM Life Insurance Company's motion for summary judgment is GRANTED in its entirety. Plaintiff Delroy R. Blaske's Complaint is dismissed with prejudice. Plaintiff's motion for partial summary judgment is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY

Date: /s/ 3-11-97

/s/ Michael J. Davis
Michael J. Davis
United States District Court

---

termination of the period for which the insurer is liable. The deadline for providing proof of claim in the policy, however, is tied to the start date of the disability, not when insurer liability terminates. Plaintiff provides no authority for the proposition that in applying the most analogous state statute of limitations, the Court can ignore specific plan provisions.

Supreme Court, U.S.
FILED
JUN 4 1998
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No. 97-1786

In The

Supreme Court of the United States

October Term, 1997

DELROY R. BLASKE,

Petitioner,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

The parent companies of Respondent are UNUM Holding Company and UNUM Corporation. Respondent has no nonwholly owned subsidiaries.

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I

Respondent UNUM Life Insurance Company of America ("UNUM") submits this Brief in Opposition to Petitioner Delroy R. Blaske's Petition for a Writ of Certiorari. As set forth below, Petitioner's request for a Writ should be denied for several reasons. Initially, Petitioner failed to raise the issue which forms the basis of his Petition in his appeal to the Eighth Circuit Court of Appeals. In addition, the decision of the Eighth Circuit Court of Appeals is not in conflict with the decisions of the Ninth Circuit Court of Appeals. Finally, the Eighth Circuit's decision to affirm the District Court grant of summary judgment to Respondent is not in error.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S QUESTION FOR REVIEW WAS NOT PRESENTED TO THE EIGHTH CIRCUIT COURT OF APPEALS OR THE DISTRICT COURT.

Petitioner's Writ of Certiorari should be denied because he did not present his Question Present for Review to either the Eighth Circuit Court of Appeals or the District Court for consideration. Initially at the District Court, Respondent moved for summary judgment asserting that Petitioner's claim for long term disability benefits should be dismissed, in part, because his claims were time-barred pursuant to the policy of long disability coverage issued by Respondent to Petitioner (the "UNUM Policy").

In response to Respondent's motion, Petitioner argued that a dispute concerning the date he became disabled created an issue of material fact. In addition, Petitioner argued that since he was disabled, the tolling provisions of a Minnesota statute applied precluding application of any limitations period. The

District Court rejected Petitioner's arguments and determined that his claims were time-barred under the UNUM Policy and a three-year statute of limitations period in a Minnesota statute.[1]

Petitioner appealed the District Court's decision to the Eighth Circuit Court of Appeals. At the Eighth Circuit, Petitioner similarly argued that his claims were not time-barred because the District Court erred in determining Petitioner's date of disability and erred in failing to apply the tolling provisions of a Minnesota statute. The Eighth Circuit affirmed the District Court. (*See* Brief of Appellant at 23-29.)

In his Petition for a Writ of Certiorari, Petitioner identifies the following Question Presented for Review:

> Does the applicable statute of limitations for a claim for disability benefits governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et. seq. ("ERISA"), act to bar the claim of the Plaintiff-Appellant in its entirety as opposed to simply barring a claim for monthly benefits falling outside the period of limitations?

Clearly, the issue stated in the Petition was not briefed, argued or decided by either the District Court or the Eighth Circuit Court of Appeals. Unlike his arguments to the District Court and Eighth Circuit, Petitioner now attempts to create a distinction between time-barred benefits within the three-year limitations period and time-barred benefits "outside" the three-year period.

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1. As noted by Petitioner, Respondent's motion for summary judgment was also based on his failure to satisfy the notice and proof of claim provisions in the UNUM Policy. While the District Court found that Petitioner's claims should also be dismissed because his failure to satisfy those provisions, the Eighth Circuit did not reach that issue and it is not part of Petitioner's Writ. Accordingly, no further reference is made to that issue.

Essentially, Petitioner frames the issue in this manner to shoe horn his case into the Ninth Circuit's holding in *Nikaido v. Centennial Life Ins. Co.* 42 F.3d 557 (9th Cir. 1994) (under Centennial Life policy, three-year statute of limitations does not bar entire claim for disability benefits since each month of continuing disability creates a new cause of action with a new statute of limitations period). However, regardless of Petitioner's rationale for modifying his argument, his failure to raise the Question Presented for Review to the Eighth Circuit Court of Appeals precludes consideration by the United States Supreme Court.[2]

Finally, as discussed more fully below, to the extent a conflict exists between the Circuits with respect to the Question Presented for Review, Petitioner's failure to raise this issue prior to his Petition undercuts his argument for review pursuant to Supreme Court Rule 10(a). Indeed, it is counterintuitive to suggest that an inconsistency exists between the Circuits when the issue in conflict was never presented, argued or decided by the Eighth Circuit Court of Appeals. For this reason alone, the Petition for a Writ of Certiorari should be denied.

II.

THERE IS NO CONFLICT BETWEEN THE EIGHTH AND NINTH CIRCUITS.

In his Petition, Petitioner's claimed justification for review of the Eighth Circuit's decision is a conflict between the Eighth and Ninth Circuits as to interpretation of the limitations provisions in ERISA-regulated policies. Essentially, Petitioner

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2. As additional evidence of his failure to raise the issue below, Petitioner did not reference or cite *Nikaido v. Centennial Life Ins. Co., supra*, in his appellate brief. (*See* Brief of Appellant at 23-29.)

argues that *Nikaido v. Centennial Life Ins. Co.*,[3] *supra*, contains a holding which is in conflict with the Eighth Circuit's decision in this matter. Petitioner's argument is without merit.

In *Nikaido*, the Ninth Circuit considered whether a claim for disability benefits pursuant to a policy issued by Centennial Life Insurance Company was time-barred by a statute of limitations. The applicable limitations period in the Centennial Life policy was three years from the time proof of loss was due. Importantly, the Centennial Life policy provided in its notice and proof of claim provisions that claimants were to provide submission of proof for "each period for which the company is liable." 42 F.3d at 560.

Based upon the "each period" language of the Centennial Life policy, the Ninth Circuit determined that claims falling outside the three-year limitations period were not time-barred. The Ninth Circuit reasoned that since claimants were responsible to provide proof of loss for each month — "each period" — of a continuing disability, a new cause of action with a new three-year statute of limitations period also began each month. *Id.*

The UNUM Policy involved in the present case does not contain a provision requiring claimants to provide proof of a continuing disability each month. Instead, the UNUM Policy requires "proof of continued disability and regular attendance of a physician within 30 days of the date we request proof."

This distinction in policy language is dispositive in this case. In *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998), the Ninth Circuit itself specifically refused to apply

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3. Petitioner misidentifies the defendant in *Nikaido v. Centennial Life Ins. Co.* as "Continental Life Insurance Company." Petitioner similarly misidentifies the policy in that case as a "Continental Life" policy.

the limitations rule it espoused in *Nikaido* to a UNUM policy. In that case, the Ninth Circuit reasoned that:

> [t]he *Nikaido* holding was based on the particular contract language at issue in that case. It simply does not apply to the proof-of-loss provision in the UNUM policy, which involves different language.

Id. at 944.

The UNUM Policy provision in this case is identical to that in *Cisneros* and, contrary to Petitioner's claim, the *Nikaido* rule could not apply. Accordingly, even if Petitioner had properly presented his Question for Review to the Eighth Circuit, there is no conflict with the Ninth Circuit. Therefore, Petitioner's claim of conflict between the Circuits does not provide justification for further review of this matter.

III.

THE EIGHTH CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT.

The final reason Petitioner's Writ for Certiorari should be denied is that the Eighth Circuit was correct in affirming the District Court's decision to dismiss Petitioner's action. ERISA contemplates reference to the most analogous state-law statute of limitations in an action to recover plan benefits. *Adamson v. Armco, Inc.*, 44 F.3d 650, 652 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3230 (U.S. Oct. 2, 1995).

Minnesota has a three-year statute of limitations applicable to claims for insurance benefits. Minn. Stat. § 62.A.04, Subd. 2(11). The UNUM Policy has a three year statute of limitations. In affirming the District Court, the Eighth Circuit determined

the limitations provision in the UNUM Policy was "more liberal than the Minnesota Statute." For his part, Petitioner has failed to provide any reason why he could not commence his claim in a timely manner. Accordingly, the Eighth Circuit was correct in affirming the District Court.

CONCLUSION

For the foregoing reasons, the United States Supreme Court should deny Delroy Blaske's Petition for a Writ of Certiorari in this matter.

Respectfully submitted,

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FILED
JUL 1 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1786

In The

Supreme Court of the United States

October Term, 1997

DELROY R. BLASKE,

Petitioner,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S RELY BRIEF

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I. INTRODUCTION

Petitioner, Delroy Blaske submits this Brief in reply to the Respondent's Brief in Opposition. This Brief will address the three arguments for denial of the Writ of Certiorari discussed in the Respondent's Brief in Opposition.

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Minnesota Statute § 62A.04, Subd. 2 (1995) 3

> Required provisions. Except as provided in subdivision 4, each such policy delivered or issued for delivery to any person in this state shall contain the provisions specified in this subdivision in the words in which the same appear in this section. The insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Such provisions shall be preceded individually by the caption appearing in this subdivision or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve.

Minnesota Statute § 62A.04, Subd. 2(7) (1995) . . . . .

PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 90 days after the termination of the period for which the insurer is liable and in case of claim for any other loss within 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

Minnesota Statute § 62A.04, Subd. 2(11) (1995)

LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

II. ARGUMENT

A. Petitioner's question for review was presented to the Eight Circuit Court of Appeals.

The Respondent alleges that the question presented for review was not argued to the Eighth Circuit Court of Appeals or the District Court. This statement is not accurate.

In presenting this Petition for a Writ of Certiorari, Petitioner asks this Court to reconcile the contradictory holdings of the United States Court of Appeals for the Eighth Circuit and the holding of the Ninth Circuit expressed in the case of Nikaido v. Centennial Life Ins. Co., 42 F.3d 557 (9th Cir. 1994). The Nikaido was cited to the Eighth Circuit panel, first during oral argument and later in the Appellant's Petition for Rehearing by the Panel. Following oral argument, acting at the direction of the Court, counsel for the Petitioner sent a letter with the case cite to the Eighth Circuit Clerk of Court.

In addition, on page 22 of Petitioner's Appellate Brief, it is argued that in a case of this nature, where an individual is suffering from a continuing disability, a separate claim arises for each period during which benefits may be payable. The tolling of the statute of

limitations is determined in reference to the period for the filing of a proof of claim.

B. There is a conflict between the Eighth and Ninth Circuits.

The Respondent argues that Nikaido v. Centennial Life Ins. Co., 42 F.3d 557 (9th Cir. 1994) is distinguishable from the present facts because of the language contained in the specific disability insurance policies interpreted in the cases. In support of this contention, Respondent looks to Cisneros v. UNUM Life Ins. Co., 134 F.3d 939 (9th Cir. 1998).

The Respondent's argument fails due to the fact that the issue in Cisneros was the application of the proof of claims provision of the policy. The Cisneros Court, interpreting UNUM policy language, did so in the context of proof of claim, not in consideration of the issue of the statute of limitation.

In fact, the UNUM policy at issue here contains the following language:

> "When are claims paid?
> When we receive proof of claim, benefits payable under the policy will be paid monthly during any period we are liable."

This UNUM policy language is consistent with the Nikaido policy language, for purposes of determining

the application of the statute of limitations. The UNUM policy contemplates monthly periods for determining the payment of disability benefits. The issue of UNUM's liability under the policy is subject to monthly review at the discretion of UNUM. The Nikaido analysis is applicable to the present case. For each month that Mr. Blaske is disabled, and UNUM fails to make payment, a separate cause of action accrues.

C. The UNUM policy is not consistent with Minn. Stat. § 62A.04, Subd. 2.

The Respondent argues that the statute of limitations provision of the UNUM policy is consistent with the Minnesota Statute (Minn. Stat. § 62A.04). Therefore, the Eighth Circuit was correct in affirming the District Court, but Respondent fails to give consideration to the manner in which Minnesota Courts have interpreted Minn. Stat. § 62A.04, Subd 2. In the case of Ryan v. ITT Life Ins. Corp., 450 N.W.2d 126 (Minn. 1990), Minnesota Supreme Court stated:

> "When an insured claims total disability benefits under a policy governed by Section 62A.04, Subds. 2(7) and (11), the limitation's period will not begin to run until 90 days after termination of the continuous period of disability."

In this case, the Petitioner has alleged a continuous period of disability. Therefore, under Minnesota law, the statute of limitations does not run

until three years after Mr. Blaske's period of disability has ended. The holding of the Trial Court, as affirmed by the Eighth Circuit Court of Appeals, ignored this interpretation of Minnesota law.

III. CONCLUSION

Therefore, Petitioner requests the United States Supreme Court to accept Delroy Blaske's Petition for Writ of Certiorari for the purpose of reviewing and clarifying this important issue of law.

Respectfully submitted,

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